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ATTORNEYS AT LAW

November 21, 2007

Ex Parte

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, WC Docket No. 06-172

Dear Ms. Dortch:

In its November 16, 2007 letter, Verizon claims that the record evidence in this proceeding demonstrates that forbearance should be granted in each of the six MSAs at issue. Nothing could be further from the truth. Verizon ignores the rampant systemic flaws in the evidence and cannot meet the test set forth in the Commission's *Omaha* precedent, which itself falls short of satisfying the statutory requirements for forbearance.

EarthLink, Inc. ("EarthLink") hereby responds to Verizon's claims as follows. First, contrary to Verizon's attempt to minimize the Commission's market share test, the *Omaha* and *Anchorage* decisions both relied on a substantial market share for full facilities-based competitors in addition to requiring that 75 percent of customer locations be capable of being served within a commercially reasonable time. Second, the Commission reasonably relied upon that market share determination as a basis for its predictions that the incumbent would have the incentives to continue to make reasonable wholesale loop offerings post-forbearance. Third, Verizon has not carried its burden of proof here because its evidence is so inherently and obviously flawed that it cannot be relied upon to prove anything. Fourth, Verizon's "jaw" charts reporting its lost lines are deceptive and ignore lines that Verizon continues to serve. Finally, even if Verizon had provided reliable evidence sufficient to meet the *Omaha* test, that test has proven to be too weak to satisfy the Section 10(a) criteria required for forbearance.

REDACTED FOR PUBLIC INSPECTION

I. *Omaha* and *Anchorage* Both Relied on Substantial Market Share Loss to Facilities-Based Competitors In Addition to Requiring that 75% of Customer Locations Be Capable of Being Served Within a Commercially Reasonable Time.

Verizon selectively misreads the *Omaha* and *Anchorage* orders when it states, "the Commission's primary focus was not on the extent to which the incumbent cable operator had already succeeded in winning customers, but instead on the extent of its network facilities . . . "[1] The plain fact is that the Commission analyzed and relied on both.

In *Anchorage*, the Commission made this absolutely clear: "we apply the same analytic framework to our analysis of the level of competition in the Anchorage study area in this proceeding that the Commission applied to its analysis of competition in the Omaha MSA. In each case, the Commission begins by examining the level of retail competition to the incumbent LEC and the role of the wholesale market. The Commission then evaluates the extent to which competitive facilities can and will be used to provide competitive services in each wire center service area where relief is sought."[2] In both cases, these were separate and independent steps in the Commission's analysis.

Moreover, it is clear that in analyzing the level of competition in the retail market in *Omaha*, the Commission looked primarily at the level of retail competition from the provider wholly independent of Verizon's facilities – Cox. The Commission specifically compared the number of retail residential customers served by Qwest in the MSA (not the wire center) with the number served by Cox in the MSA.[3]

Only after the Commission had found a sufficient level of retail competition, which the Commission reviewed by comparing relative market shares between the ILEC and its principal facilities-based competitor, did the Commission turn to the extent of alternative facilities coverage to end user locations in the wire center.

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1 Letter from Evan T. Leo, Counsel for Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 at 1 (filed Nov. 16, 2007) ("Verizon November 16 Ex Parte").

2 *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 20 FCC Rcd. 1958, 1963 (¶ 9) (2007) (*"Anchorage"*). *See also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, 19447 (¶¶ 65, 69) (2005) (*"Omaha"*).

3 *Omaha*, 20 FCC Rcd. at 19448 (¶ 66). *Anchorage* presented a unique situation, not present here, where the incumbent cable operator was transitioning, particularly for residential customers, from use of UNE-L to its own cable plant in the areas served by cable.

Verizon fails entirely to show how the level of retail competition, particularly full-facilities retail competition, compares with *Omaha* and *Anchorage*, either on an MSA or wire center basis, particularly among facilities-based carriers wholly independent of Verizon's loop facilities. Thus, Verizon fails to demonstrate that it meets any of the Section 10(a) criteria under the *Omaha* analytic framework.

II. Requiring A Showing that the Facilities-Based Competitor Has A Very Substantial Market Share is Reasonable in Evaluating Whether Section 10(a)'s Requirements are Met.

Verizon's argument at its core is that it does not matter whether it has 99.99 % market share or even much less market share, so long as the cable company can offer "the full range of services that are substitutes for the incumbent LEC's local service offerings" to over 75 % of customer locations within a commercially reasonable period of time.[4] As discussed above, this is clearly not the approach taken by the Commission in *Omaha* and *Anchorage.*

The Commission's deliberate choice to consider market share as well as alternative facilities coverage was reasonable. One of the core elements on which the Commission relied in *Omaha* was its prediction that Qwest would continue to have incentives to make reasonable wholesale loop offerings available post-forbearance. The Commission made explicit the link between the market share of facilities-based providers wholly independent of the ILEC and its predictive judgment that the ILEC would in the future offer reasonable wholesale loop offerings: "The very high levels of retail competition that do not rely on Qwest's facilities – and for which Qwest receives little or no revenue – provide Qwest with the incentive to make attractive wholesale offerings available so that it will derive more revenue indirectly from retail customers who choose a retail provider other than Qwest."[5] In other words, Cox's high market share in the Omaha MSA was the precondition and basis for the FCC's predictive judgment that notwithstanding the lack of wholesale alternatives, Qwest would continue to make loops available at reasonable wholesale rates.

As it turns out, the Commission's predictive judgment in this regard in *Omaha* proved incorrect.[6] However, reducing the level of retail market share required will only serve to make it even less likely that the Commission's prediction that the ILEC will offer reasonable wholesale loop rates will come true. There is no basis for ignoring or lowering the level of actual market share loss required for forbearance, as Verizon now requests.

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4 *See* Verizon November 16 Ex Parte at 1 (quoting *Omaha* at n. 156 (defining "coverage")); *Omaha*, 20 FCC Rcd. at 19450 (¶ 69).

5 *Omaha*, 20 FCC Rcd. at 19449 (¶ 67).

6 *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Petition for Modification of McLeodUSA Telecommunications Services, Inc., WC Docket No. 04-223 (filed July 23, 2007).

Nor should the market share test be applied on a wire-center basis because even substantial market share gains by competitors in individual, isolated wire centers will be unable to incent the desired wholesale market behavior by the incumbent. Indeed, the experience in the Omaha market shows that the level of market share captured by independent facilities-based competitors must be even higher than in *Omaha* to satisfy Section 10(a).

III. Verizon Has Not Carried Its Burden of Proof Because Its Evidence Is Inherently and Obviously Flawed.

As petitioner, Verizon bears the burden of proof in this proceeding. It is Verizon's burden to come forward with credible evidence showing that forbearance is justified under each and every prong of Section 10(a).

Verizon has failed to do so. Verizon's evidence remains so faulty that it cannot be relied upon to prove anything.

The record already demonstrates that Verizon's E911 data is wholly unreliable. In the first instance, this data should not be permitted because it has been misappropriated in violation of Section 222(b) of the Communications Act.[7] The House of Representatives recently confirmed this when it passed H.R. 3403 by a vote of 406-1, which would, *inter alia*, ban precisely this type of use of this data when not in response to a governmental request.

In any event, as the Virginia Corporation Commission found, and as CLEC comparisons with their actual line counts have shown, this data is wholly inaccurate as a measure of CLEC lines, particularly at the wire center level.[8] On an MSA-basis, Verizon's data dramatically overstates both residential and business CLEC lines.[9] On a wire-center basis, Verizon's E911 data reports CLEC lines in wire centers where CLECs don't even do business. For example, Verizon claims that one CLEC in the New York MSA has customers in **[Begin Highly Confidential]** **[End Highly Confidential]** times as many wire centers than it actually does. In another instance, Verizon claims that one CLEC with **[Begin Highly Confidential]** **[End Highly Confidential]** in the Boston MSA has customers in **[Begin Highly Confidential]**

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7 *See* New Hampshire Public Utilities Commission Amended Joinder in Competitive Carriers Motion To Dismiss, WC Docket No. 06-172 (filed Feb. 7, 2007); Opposition of EarthLink, Inc. and New Edge Networks to the Petitions of Verizon Telephone Companies for Forbearance at 54-57, WC Docket No. 06-172 (filed March 5, 2007).

8 *See Application of Verizon Virginia Inc. and Verizon South Inc. For a Determination that Retail Services Are Competitive and Deregulating and Detariffing of the Same*, State Corporation Commission of Virginia, Case No. PUC-2007-00008; Letter from Brad E. Mutschelknaus, et al., Kelley Drye & Warren, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 5, 2007).

9 *See* Letter from John T. Nakahata, Counsel for EarthLink, to Marlene H. Dortch, Secretary, Federal Communications Commission, Presentation at 8-10, WC Docket No. 06-172 (filed Oct. 30, 2007).

[End Highly Confidential] wire centers in that MSA. In short, as EarthLink has told the Commission, Verizon's E911 wire center data is wholly unreliable and must be discarded. It is notable that although Verizon now claims that its own residential line counts show a 1:1 correspondence to E911 data counts, it presents this data only at the MSA level.[10] Verizon's failure to provide wire center level comparisons itself is telling.

Furthermore, recently filed cable company data further shows that there were significant problems with Verizon's E911 data. For example, consider the following examples, which Verizon nowhere explains:

[Begin Highly Confidential]

[End Highly Confidential]

Verizon's most recent submission again demonstrates that it continues to have inherent and systematic problems with its data.[11] In particular, Verizon purports to show Comcast's market reach in New York, Boston, Philadelphia, Pittsburgh, and Providence by converting Comcast's data on homes passed (already a complicated approximation based on Comcast's estimates of Verizon's wire centers)[12] into wire center data comparable to that supplied by Verizon and then calculating the percentage of all wire center households passed by Comcast.[13] The problem is readily apparent – according to Verizon, Comcast passes more households than actually exist. In the New York MSA, for example, Verizon claims that Comcast "covers" **[Begin Highly Confidential]** **[End Highly Confidential]** of the households in the Beach Haven, New Jersey wire center and **[Begin Highly Confidential]** **[End Highly Confidential]** of the households in Surf City, New Jersey. Far from merely a "discrepancy,"[14] this data reveals

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[10] Verizon November 16 Ex Parte at 10.

[11] *See id.*, Attachment A, Exhibits 1-5.

[12] *See* Letter from Michael C. Sloan, Counsel for Comcast, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 9, 2007).

[13] *See* Verizon November 16 Ex Parte, Attachment A, Exhibits 1-5.

[14] *Id.* at 3 n.2.

systemic inaccuracy. In the Philadelphia MSA, for example, Verizon's data shows that Comcast passes more households than exist in **[Begin Highly Confidential]** **[End Highly Confidential]** of 150 total wire centers. In other words, Verizon's data is irrefutably wrong for **[Begin Highly Confidential]** **[End Highly Confidential]** of the Philadelphia MSA's wire centers.

Such rampant inaccuracy in Verizon's evidence is no isolated incident. In numerous cases, there is no wire center location coverage data in the record comparable to that supplied in Omaha and Anchorage. While Charter provided some information, it declined to provide coverage data in certain wire centers because – like Verizon's data on Comcast's penetration, an "apparent anomaly" in Verizon's household data made any calculations plainly erroneous.[15]

In short, Verizon conclusions rest on faulty data and cannot withstand scrutiny.

IV. Verizon's "Jaw" Charts are Deceptive and Ignore Lines that Verizon Continues to Serve.

Verizon's "jaw" charts are also flawed. The Commission expressly declined to rely on such evidence in its *Anchorage* decision – and for good reason.[16] No conclusions can be drawn from such data because it lacks any context. For example, Verizon includes the switched lines it lost that had been used for dial-up Internet access, but nowhere includes the DSL and special access lines it has gained as those lines migrated to broadband. Similarly, the loss of the second "teen" line to wireless (frequently its own affiliate) does not demonstrate that Verizon's predominance among primary voice lines is threatened.

Moreover, Verizon's "jaw" charts plainly include line "loss" to CLEC competition that is not at all independent of Verizon's facilities. Verizon appears to have included resold lines and UNE-P lines as lines that it "lost," even though these lines remain entirely on Verizon's facilities – with Verizon now able to charge a "market" rate for what was UNE-P.

Furthermore, Verizon's "jaw" charts appear to include UNE-L lines, even though the FCC has specifically prohibited reliance on UNE-L lines as a basis for forbearance from Section 251(c)(3)'s and 252's loop unbundling requirements: "Granting [an ILEC] forbearance from the application of section 251(c)(3) on the basis of competition that exists only due to section

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[15] *See* Letter from K.C. Halm, Counsel for Charter, to Marlene H. Dortch, Secretary, Federal Communications Commission at 3, WC Docket No. 06-172 (filed Nov. 6, 2007).

[16] *Anchorage*, 20 FCC Rcd. at 1976 n. 88 ("We reject ACS's contention that the sheer fact of its line loss compels forbearance. For instance, the abandonment of a residential access line does not necessarily indicate capture of that customer by a competitor, but may indicate that the consumer converted a second line used for dial-up Internet access to an incumbent LEC broadband line for Internet access." (citations omitted)).

251(c)(3) would undercut the very competition being used to justify the forbearance, and we decline to engage in that type of circular justification."[17]

V. In Any Event, the *Omaha* Test Does Not Satisfy Section 10(a)'s Requirements.

EarthLink agrees with Verizon that Congress established forbearance as an "independent alternative."[18] But the Commission must be more, not less, rigorous in determining whether forbearance is warranted here.

A. Section 10(a)(1) Cannot Be Met Without a Substantial Wholesale Market for Loops or Proof that A Reasonable Competitor Can Self Provision Loops.

By its terms, Section 10(a)(1) requires the Commission to find that "enforcement of such regulation or provision [here, the loop unbundling provisions of Section 251(c)(3)] is not necessary to ensure that the charges, practices, classifications or regulation by, for, or in connection with that . . . telecommunications service [here, UNE loop service] are just and reasonable and are not unjustly or unreasonably discriminatory." Verizon has not shown, and the *Omaha* test does not specifically show, that the rates for UNE loops would, under the conditions established in the *Omaha* test, remain "just and reasonable" and "not unjustly or unreasonably discriminatory."[19]

As CompTel recently reiterated, the existence of wholesale market competition from non-incumbent wholly facilities-based providers is a necessary pre-requisite for a finding that Section 10(a)(1) has been satisfied.[20] Without wholesale market competition independent of the ILEC – which was absent both in *Omaha* and *Anchorage* – CLECs that do not own loops will not be able to obtain the necessary inputs to offer retail services.[21] Indeed, in the *TRO*, the Commission acknowledged that intermodal competition might someday lead to a finding of non-impairment, but only when "the increased presence of viable alternative platforms may help increase competitive alternatives, *both retail and wholesale*, in the narrowband and broadband mass markets."[22]

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[17] *Omaha*, 20 FCC Rcd. at 19450 n. 185.

[18] Verizon November 16 Ex Parte at 6 (citing *ATT v. FCC*, 236 F.3d 729, 738 (D.C. Cir. 2001)).

[19] 47 U.S.C. § 160(a)(1).

[20] Letter from Jonathan Lee, Comptel, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 06-172 (filed Nov. 13, 2007).

[21] *Id.* at 2.

[22] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17127 (¶ 246) (2003) (*"TRO"*).

The only possible logical alternative to a functioning wholesale market with wholesale loop transmission providers other than Verizon would be if a reasonably efficient CLEC, "consider[ing] *all* the revenue opportunities that a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell, taking into account limitations on entrants' ability to provide multiple services, such as diseconomies of scope in production, management, and advertising," could self-deploy its own loops.[23] Verizon has not come close to making such a showing here, giving no basis to rebut in these markets the nationwide finding of impairment with respect to DS-0 loops or, for higher capacity loops, when the *TRRO*'s thresholds are not met. Notably, simply because the cable companies have been able to deploy their own last mile transmission facilities does not mean that a reasonably efficient competitor could do so. In the *TRRO*, the Commission expressly rejected arguments that because a single competitor could self-deploy, all other competitors should be presumed to be able reasonably to self-deploy.[24] The Commission specifically stated, "[t]hus, for example, the fact that one carrier possesses rights-of-way that mitigate the costs of constructing transmission facilities would not render 'inefficient' another carrier that does not enjoy such rights-of-way."[25]

Applying Section 10(a)(1) in this manner would harmonize the Commission's forbearance test under Section 10(a)(1) with its approach to impairment in the *TRO* and *TRRO*. Where there was a vibrant wholesale market including facilities-based alternatives to the ILEC, Section 10 could provide forbearance even if the reasonable efficient competitor would be unable to self-deploy its own loops, and thus might still be impaired. This would be a superior alternative to the Commission's failed predictive judgment in *Omaha* that ILECs will offer wholesale loop service at reasonable rates.

B. Section 10(a)(2) Cannot Be Satisfied by Duopoly.

Section 10(a)(2) requires the Commission to find that "enforcement of" the loop unbundling provisions of Section 251(c)(3) are "not necessary for the protection of consumers."[26] Verizon has not shown, and the *Omaha* test does not specifically show, that – contrary to economic theory – duopoly provision of services will adequately protect consumers.

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23 *See TRO*, 18 FCC Rcd. at 17047 ¶ 197.

24 *See Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, 2548 n.77 (2005) ("*TRRO*") ("We therefore reject the arguments of some parties that just because one competitive LEC holds a particular set of assets, 'by extension, any efficient [competitive LEC] must be deemed to hold those assets.'")

25 *Id.*

26 47 U.S.C. § 160(a)(2).

As EarthLink's previous submissions explain, basic economics predict that granting forbearance from Section 251(c)(3) would harm consumers by increasing concentration and reducing competitive market discipline in the relevant markets. Without Section 251 obligations, Verizon would potentially be able to raise the rates for UNEs substantially, and thus affect the retail prices charged by EarthLink and other UNE loop-based broadband competitors. According to basic economic theory, Verizon would then have the incentive to engage in a classic, anticompetitive "raising rivals' cost" strategy, where the monopoly supplier of a retail input exercises market power by raising the input costs of its retail competitors.[27] The likely result – a duopoly provision of services – does not replicate the discipline of a truly competitive market. As both the Commission and the courts have recognized, "[w]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding, in order to . . . achieve profits above competitive levels."[28] This is not a new story, but one predicted by economic literature and consistent with the Commission's experience with wireless and long distance.[29]

Verizon has never demonstrated why these well-established economic principles would not apply here or how the duopoly provision of services would adequately protect consumers as required by Section 10(a)(2).

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[27] *See, e.g.,* Thomas Krattenmaker & Steven Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 Yale L. J. 209, 234-36 (1986) (describing the "bottleneck" method of raising rivals' costs, whereby a supplier can increase the price of a necessary input to the point where an independent downstream producer cannot compete profitably against the vertically integrated incumbent producer).

[28] Application of Birmingham Christian Radio, Inc., Assignor and Radio South, Inc., Assignee; For Consent to Assignment of License of WSPZ(AM), Memorandum Opinion and Order, 18 FCC Rcd 7909, 7920 (¶ 31) (2003) (quoting FTC v. Heinz, 246 F.3d 708, 724-25 (2001)).

[29] *See* Sixth Annual CMRS Competition Report, Thomas J. Sugrue Opening remarks (power point slide *Average Price Per Minute for Mobile Telephone Service* showing dramatic drop in prices as wireless industry moved from a duopoly to a fully competitive market) *available at* http://wireless.fcc.gov/statements/010620cmrsSugrue_slides.ppt; As RBOCs themselves have recognized, "the addition of even a single competitor to a three-firm environment will produce significant competitive benefits." *See Application by New York Telephone Company (d/b/a Bell Atlantic – New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York*, Application of Bell Atlantic – New York for Authorization to Provide In-Region, InterLATA Services in New York, CC Docket No. 99-295, at 76 (filed September 29, 1999). *See also* Parker, Philip, and Lars-Hendrik Röller, *Collusive Conduct in Duopolies: Multimarket Contact and Cross-Ownership in the Mobile Telephone Industry*, 28:2 Rand Journal of Economics: 304-322 (1997) (finding, during the period of CMRS duopoly, that "cellular prices are significantly above competitive levels"); Gagnepain, Philippe and Pedro Pereira, *Entry, Costs Reduction, and Competition in the Portuguese Mobile Telephony Industry*, 25 International Journal of Industrial Organization, 461-481 (2007).

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Accordingly, Verizon continues to fail to meet the three requirements of Section 10(a) for forbearance from the requirement to unbundle UNE loops pursuant to Sections 251 and 252 of the Communications Act.

Sincerely,

Stephanie Weiner / CEM

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